

1 If your Honor looks at Page 46 of those
2 articles, you will see that the company shall require
3 the manager, MapleWood Management, to undertake a
4 management agreement which does exist. Essentially,
5 the management of the company, the management of the
6 MapleWood Offshore Company -- I'm sorry, MapleWood
7 Offshore Fund.

8 THE COURT: Well, it says in Paragraph 83
9 that the board shall, pursuant to a management
10 agreement, retain the manager to exercise, subject to
11 the board's oversight all management, control and
12 functions of the company.

13 MR. MILLER: Correct.

14 THE COURT: It is that section that gives
15 them control over the Offshore?

16 MR. MILLER: Yes, your Honor.

17 THE COURT: And having control over Offshore,
18 that means that they are an affiliate of MapleWood
19 Partners?

20 MR. MILLER: That's correct, your Honor.

21 THE COURT: And that the representation of
22 MapleWood Partners is, therefore, implicitly the same
23 thing as the representation of Offshore?

24 MR. MILLER: Yes. And I would go beyond
25 that. I believe that the Gibson Dunn attorneys

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1 actually represented the MapleWood Offshore Fund. They
2 negotiated the subscription agreement with Casita,
3 regardless of whether there was a retainer agreement
4 between those two parties. And I think it is more
5 relevant to the conflict waiver agreement which we are
6 citing.

7 THE COURT: On the theory that they are an
8 affiliate because they exercise control?

9 MR. MILLER: Right.

10 THE COURT: Therefore, the demonstration of
11 that is the articles of association.

12 MR. MILLER: Yes, your Honor. Therefore they
13 are entitled to rely on that conflict waiver agreement.

14 Now, the plaintiff has set forth some
15 arguments as the why the conflict waiver agreement
16 doesn't apply. I don't think those have any merit.
17 The main argument that they have is that it relates to
18 some ancillary agreement --

19 THE COURT: That's a scope argument.

20 MR. MILLER: Correct, your Honor. It is our
21 position that the scope of the waiver includes this
22 litigation because it is all related to the failure of
23 AMC Computer. I think that's clear and I think your
24 Honor need look no further really than the affidavit
25 that the plaintiff --

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1 THE COURT: Let's look at the language of
2 that waiver agreement and tell me why it is clear. It
3 is an exhibit to the order to show cause.

4 MR. MILLER: It is an exhibit.

5 THE COURT: Exhibit A to the Karlan
6 affidavit.

7 MR. MILLER: Yes. It is also attached to our
8 moving papers.

9 THE COURT: I have more than one copy. All
10 right, I have it in my hand.

11 MR. MILLER: Okay. You will see that it
12 refers to representation of Casita, the plaintiff, in
13 connection with the proposed restructuring of AMC
14 Computer currently being contemplated. That's all it
15 says.

16 THE COURT: Okay.

17 MR. MILLER: So what is that restructuring,
18 quote, unquote, of the transition that Gibson Dunn was
19 referring to?

20 As a threshold matter, Gibson Dunn
21 represented MapleWood at this time, and didn't set
22 forth in this letter that they considered that to be
23 narrowly construed. This is a recent --

24 THE COURT: Narrowly construed to what?

25 MR. MILLER: To the agreement to restructure

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1 certain equity and debt of a gentleman named Sonny
2 Chabra.

3 THE COURT: Why would they do that when the
4 opening sentence says that it is in connection with the
5 proposed structuring agreement? Isn't it self-evident?

6 MR. MILLER: If your Honor will permit me, I
7 have another chart.

8 THE COURT: Are you done with that chart?

9 MR. MILLER: Yes, your Honor.

10 THE COURT: Do you have a small version of
11 what you have there?

12 MR. MILLER: Yes, your Honor. (Handing)

13 Your Honor was asking whether the conflict
14 waiver relates to this Chabra agreement, which Casita
15 now contends it relates to.

16 I think that the evidence shows that this is
17 a recently concocted theory. For example, you see the
18 agreement with Mr. Chabra which was attached to
19 Mr. Karlan's papers in this case was dated November 21,
20 2002. In the first e-mail you see in the chart in
21 front of you, on November 27 after that agreement was
22 executed, Mr. Ekkehart Hassels-Weiler sent an e-mail to
23 MapleWood Partners' employee Robert Reale asking him
24 for a set of the documents for this agreement with
25 Sonny Chabra to provide to Gibson Dunn -- I'm sorry.

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1 Casita is not a party to that Chabra agreement. Gibson
2 Dunn's name doesn't appear anywhere in it. We
3 submitted affidavit evidence from the MapleWood people
4 that says Gibson Dunn was not involved in the
5 negotiations of that. And this e-mail is further
6 corroboration of the fact that Gibson Dunn wasn't even
7 involved in the negotiation of the agreement with
8 Chabra. Therefore, how is it that a conflict waiver
9 letter they signed relates to a transaction they didn't
10 participate in? I think it is a much more logical
11 reading to conclude that this conflict waiver letter
12 relates to the restructuring of AMC Computer's credit
13 facility which Casita's affiliate Eugenia negotiated
14 starting in September 2002 with Gibson Dunn as its
15 counsel until that agreement was executed in
16 January 30, 2003.

17 THE COURT: How can I take a waiver letter
18 that in most unambiguous terms refers to one matter and
19 take some other document and then read it differently?
20 How can I do that?

21 MR. MILLER: I'm sorry, your Honor?

22 THE COURT: How can I take the letter which
23 is unambiguous in its terms in connection with a
24 proposed restructuring of AMC and accept an extrinsic
25 document, this November 21, 2002 letter, and conclude

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1 that the waiver means something that it says in its
2 plain terms, at least without conducting an evidentiary
3 hearing, if that's necessary? And if it is
4 unambiguous, there is no reason to do that.

5 MR. MILLER: I believe it is unambiguous, and
6 it is unambiguous that it relates to the Eugenia loan.
7 That's the restructuring Gibson Dunn was -- that's the
8 restructuring that they had meant to discuss shortly
9 before this waiver letter. In our affidavits that we
10 submitted we provided the evidence and views of the
11 MapleWood people that that's what the waiver letter
12 agreement related to. What evidence does Casita
13 provide you to say that it relates to something else?
14 Nothing. They provided an affidavit from Ms. Becker
15 who drafted this agreement which, if you read
16 carefully, your Honor you will see that it is
17 conspicuously silent in any affirmation by her that
18 this conflict waiver related to the Chabra agreement
19 which they contend in their papers it related to. I
20 think that absence is telling, your Honor. Gibson Dunn
21 knows perfectly well that this waiver was in connection
22 with the loan transaction that underlies the failure of
23 AMC Computer and all related litigation. I think the
24 agreement is unambiguous in that regard, and I think we
25 submitted ample documentary and testamentary evidence

1 from the MapleWood people as to what the conflict
2 waiver letter really related to. So we think that the
3 conflict waiver clearly applies in this case, and that
4 your Honor should enforce it. It is unconscionable
5 that Gibson Dunn can draft and send its client a
6 conflict waiver letter that says they won't participate
7 in litigation between the parties' affiliates and then
8 turn around and ignore that, which is what they are
9 doing here.

10 Unless your Honor has further questions --

11 THE COURT: I don't.

12 MR. MILLER: I will be seated. Thank you,
13 your Honor.

14 THE COURT: I turn now to Mr. Karlan.

15 Mr. Karlan, I have the same question for you
16 I asked Mr. Miller, and that is: Is there a sufficient
17 record before me to decide the question, for example,
18 of affiliation, scope of the agreement and matters of
19 that sort, or do I need to conduct an evidentiary
20 hearing or refer it for an evidentiary hearing?

21 MR. KARLAN: May I take a running start at
22 that question?

23 THE COURT: A running start or a jump start?

24 MR. KARLAN: A running start.

25 THE COURT: Go ahead. Take your time.

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1 MR. KARLAN: They have got the burden of
2 proof here. If the record before you is not adequate
3 to persuade you as a matter of fact they have
4 established what they need to establish in order to
5 disqualify us, then the motion should be denied.

6 THE COURT: But you put in evidence in
7 opposition.

8 MR. KARLAN: I have.

9 THE COURT: And there may be a factual
10 dispute raised by that. And then the question is --
11 let me back up to be completely precise, and if I'm not
12 precise you will tell me.

13 The burden of going forward is on them. They
14 have to meet that burden in the papers they have
15 submitted. And if I am satisfied they have met it,
16 then the burden is yours to disprove or rebut. And the
17 question that I have, assuming that I am satisfied that
18 they met their burden to go forward, of going forward,
19 are there now factual issues that are raised from the
20 opposing set of papers, or can I resolve it on the
21 reading of the papers themselves?

22 MR. KARLAN: Judge --

23 THE COURT: Is that clear?

24 MR. KARLAN: It is. I answer you this way:
25 I think that on this record, with all due respect,

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1 there are only two possible things you can do. And it
2 is basically where Judge Chin came out yesterday. You
3 can either deny the motion or conclude that you need
4 some additional evidence before denying it. It is that
5 that Judge Chin is trying to decide. He essentially
6 ruled out the possibility of granting the motion on
7 these papers, and I respectfully suggest that you
8 should too.

9 The different factual issues that you have
10 raised really warrant separate discussion, and with
11 your indulgence, I would like to go through them.

12 THE COURT: Sure. We have a half hour yet.

13 MR. KARLAN: I don't think I will use it all
14 unless you have questions.

15 Just for purposes of clarity, I would like to
16 start with the waiver letter, deal with that in its
17 entirety. I don't know that it is analytically helpful
18 to jump back and forth. They are separate grounds for
19 disqualification.

20 With respect to the letter agreement, there
21 are three reasons, I respectfully suggest, why there is
22 not a basis for disqualification here. The first is
23 that there is no evidence to support the proposition
24 that Partners, which is the MapleWood referred to in
25 the letter, and the Offshore --

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1 THE COURT: Partners what? I didn't hear
2 what you said.

3 MR. KARLAN: Partners is the MapleWood that
4 is referred to in the letter.

5 THE COURT: I understand.

6 MR. KARLAN: There is no evidence to support
7 the contention of Mr. Miller that Partners is an
8 affiliate of the Offshore Fund, which is the defendant
9 in this case. And if they are not affiliates, then the
10 letter has no application.

11 Let me quickly -- let me tell you what I
12 think the other two bases are, and I will talk about
13 each of them.

14 The second reason the letter is not a reason
15 for disqualification is that the sentence in the letter
16 which Ms. Becker says that we are not going to
17 represent you in litigation only applies to lawsuits
18 that are, quote, in connection with the transaction.
19 And even if Mr. Miller's interpretation of this letter
20 is accepted, and the transaction is meant to mean the
21 loan by Eugenia which is not a party here to AMC --

22 THE COURT: I'm sorry. The phone rang and I
23 got distracted. Tell me again.

24 MR. KARLAN: I am telling you the second
25 reason.

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1 THE COURT: Start from the beginning.

2 MR. KARLAN: The second reason the letter
3 doesn't apply is that it applies -- the promise not to
4 represent applies only to litigation that is, quote, in
5 connection with a transaction. And Mr. Miller wants to
6 interpret the word "transaction" in this letter -- and
7 just for now I will go with him and let him have his
8 way. Mr. Miller says the word "transaction" in that
9 letter should mean the loan from Eugenia, which is not
10 a party to this lawsuit, to AMC, which is not a party
11 to this lawsuit. Let's just assume for right now
12 that's what the word "transaction" in this letter
13 means. This lawsuit is not in connection with that
14 loan. Eugenia is not a party, AMC is not a party.
15 That loan agreement is irrelevant, okay?

16 The third reason why the letter is not a
17 basis for disqualification here is that there is no
18 evidence that anyone other than Ms. Becker ever signed
19 the letter. Mr. Miller represented to you -- maybe he
20 didn't intend to, but during his oral argument he said
21 it was signed by everybody. Mr. Reale testifies in his
22 affidavit that he can't find any copies in his files
23 that are executed by anybody. We cannot find any
24 copies in our files that are executed by anybody. I
25 asked Mr. Miller yesterday if he had exhausted his

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1 search in that regard, and I have not heard back from
2 him to the contrary, so there is absolutely no evidence
3 the letter was ever signed. And for those reasons, we
4 just don't think the letter has any applicability here.

5 The question of whether Partners and the
6 Offshore Fund are or are not affiliates is not one that
7 can be dispensed with in a couple of sentences, but we
8 do discuss it in the papers, but let me hit a couple of
9 highlights.

10 If you look at the articles of association
11 that Mr. Miller called your attention to earlier --

12 THE COURT: Yes.

13 MR. KARLAN: -- on Page 45 in Sections 78 and
14 thereafter there is a section entitled Powers and
15 Duties of the Board, which begins, quote, The business
16 of the company shall be managed by the directors.

17 The notion that Mr. Glaser is sort of the
18 keeper of this offshore fund who dictates, you know,
19 everything that the fund does is both not common sense,
20 but, more importantly, is belied by the articles of
21 association. There is no evidence about who is on the
22 board. Mr. Miller has represented to you that he is
23 one of three members of the board. Let's assume that
24 he is right. Mr. Glaser is not controlling this fund,
25 the board is controlling the fund. Partners is surely

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1 not controlling the fund. Partners has a contractual
2 relationship with the Fund, and that's all Partners
3 has.

4 THE COURT: What is the meaning, as you view
5 it, of Paragraph 82 B on Page 46 which uses the word
6 "control"? I'm sorry, it's Paragraph 83.

7 MR. KARLAN: The board shall?

8 THE COURT: Yes, sir.

9 MR. KARLAN: The board shall, pursuant to a
10 management agreement, retain the manager to exercise,
11 subject to the board's oversight, all management.

12 Your Honor, let's not get caught up in the
13 fanciness of this Cayman Islands company. Any domestic
14 corporation has a board of directors and executives who
15 serve the board and are hired and fired by the board.
16 This has a written management agreement.

17 THE COURT: So all the management agreement
18 gives the manager is it delegates control that would
19 otherwise be residing in the board, and the actual
20 control is the board of directors?

21 MR. KARLAN: Exactly.

22 The paragraph Mr. Miller read to you, 82 A,
23 with all respect, I don't know he did it intentionally
24 but he omitted the first few words: To the extent
25 deemed necessary or appropriate by the board, the

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1 company shall require.

2 The board can do this itself, your Honor. If
3 you look at 83 on Page 46 toward the end of that very
4 first full block paragraph there is a sentence
5 beginning: Without limiting the generality of the
6 foregoing -- I am now on Page 46, Paragraph 83 toward
7 the end of the big block just before A.

8 THE COURT: I see it.

9 MR. KARLAN: Without limiting the generality
10 of the foregoing, the board is authorized and the board
11 may authorize the manager.

12 So, your Honor, the power resides in the
13 board, and the board is free, if it wishes to do so, to
14 enter into a written agreement which, by the way, you
15 have not been given and neither have we.

16 Now, beyond all that, you have testimony from
17 the woman who wrote the letter saying what she thought
18 the word "affiliates" meant in that letter. No one
19 else appears to have ever signed the letter, and you
20 don't have testimony from anybody else indicating what
21 they thought the word meant.

22 So, your Honor, I would respectfully suggest
23 that Partners and the Offshore Fund are not affiliates,
24 and this suit is not in connection with the Eugenia
25 loan to AMC. The letter just completely is beside the

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1 point.

2 THE COURT: Incidentally, I may have
3 blundered before. The suit that is involved with
4 Justice Freedman involves Eugenia?

5 MR. KARLAN: It does.

6 THE COURT: You know, I don't think I will
7 call her. These cases are completely separate. She
8 will do what she thinks is appropriate, as will I.

9 Go ahead.

10 MR. KARLAN: Unless your Honor has questions,
11 I am going to turn to the second prong of the
12 disqualification motion.

13 THE COURT: I don't, so go ahead.

14 MR. KARLAN: I would like to, if I could,
15 underscore a couple of facts that I am not sure are
16 coming through cleanly enough.

17 First of all, the work that was done in 1998
18 which Mr. Miller has described, Mr. Miller has told
19 that you it was done by Gibson Dunn & Crutcher lawyers.
20 I think I know what he means by that, but I want to
21 make sure your Honor knows what he means by that. It
22 was done by the law firm of Chadbourne & Parke, not
23 Gibson Dunn & Crutcher. In 1998 Scott Kislin and
24 Dennis Friedman, the two corporate lawyers who are the
25 focus of this entire motion, didn't work at Gibson

1 Dunn, they worked at Chadbourne & Parke. They didn't
2 come to Gibson Dunn until the middle of the year 2000.
3 So when he uses "Gibson Dunn" and "lawyers," I know he
4 is talking about Mr. Kislin and Mr. Friedman, but in
5 '98 when they did that work, they were at Chadbourne &
6 Parke.

7 Now, Mr. Friedman has put in an affidavit
8 which is attached to my affidavit in which he says I
9 never billed any time to any MapleWood Partners matter
10 ever. Mr. Miller has the invoices which have the
11 timesheets, and if that were false, he would have
12 called it to your Honor's attention.

13 Mr. Kislin has given an affidavit in which he
14 describes what he did when he was at Chadbourne, and he
15 says, I haven't done any Partners work or MapleWood
16 work in two years. And that appears to be undisputed.

17 None of the Gibson Dunn litigators working on
18 this matter in front of you, Judge, were ever at
19 Chadbourne & Parke, ever represented MapleWood, or know
20 anything about any of this stuff, okay?

21 A couple of times Mr. Miller has called me up
22 short and suggested I have said something inaccurate
23 with respect to some of this, and sometimes he is
24 actually right. And my defense is only that I wasn't
25 there. I wasn't at Chadbourne, I didn't do any of this

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1 Fund was a client of Gibson Dunn, we still think the
2 motion should be denied for several other reasons.

3 First of all, part of the test, as set forth
4 by the Court of Appeals, is that there has to be a
5 conclusion that the former client will be adversely
6 affected by the existing suit. Now, if the Offshore
7 Fund is not a former client of Gibson Dunn & Crutcher,
8 and the only former client we are talking about is
9 Partners here, Partners is not going to be adversely
10 affected by the outcome of this suit. I read the reply
11 papers, I don't perceive them to be arguing to the
12 contrary. Partners has no financial or other stake in
13 the outcome of this suit; or if it does, there is
14 certainly nothing in the record to reflect it.

15 The other piece under Tekni-Plex and Solow is
16 that the prior representation and the current
17 representation have to be substantially related, which
18 the First Department Appellate Division along with the
19 federal courts in New York have interpreted to mean
20 identical. And, clearly, the prior representation of
21 Mr. Kislin while he was at the Chadbourne firm in
22 creating these documents, does not present an identical
23 set of issues to this litigation. The case here turns
24 on whether or not the subscription agreement permits
25 the fund to make a capital call this late in the game.

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1 There are unambiguous provisions in the agreement which
2 your Honor has before you which don't require parole
3 evidence. We would certainly not tender any parole
4 evidence, and we would oppose the submission of any
5 parole evidence on this question.

6 In Paragraph 15 of the complaint we talk
7 about Section 1.3 A 3 of the subscription agreement
8 which says that the plaintiff is not required to make
9 capital contribution after the expiration of the
10 investment period.

11 And there is going to be a question of fact
12 about when the investment period termination date
13 occurred. We allege that it occurred in May of 2004.
14 I have read the reply papers and the moving papers on
15 this motion submitted by Mr. Miller. Nowhere does he
16 deny that's correct. I am not sure exactly what
17 defense they propose to make on that question, but you
18 are not going to need parole evidence. What we are
19 going to need is testimony, I assume, from some manager
20 person at the fund who may have to, you know, bring out
21 some records. But what the signatories thought when
22 they signed the document? No. That's not this kind of
23 case. The representation simply doesn't overlap.
24 There is no possibility of misuse. Even if Mr. Kislin
25 was a litigator and assigned to this case, there is no

1 possibility of misuse of confidential information.

2 Finally, Judge, the Solow case, which
3 involved as this one does, a lawyer moving from one
4 firm to another firm, points out the contemporary
5 reality of legal practice. It is unfair to clients to
6 deny them counsel of their choice because former
7 counsel moved from one firm to another. Mr. Kislin is
8 a corporate transaction lawyer. He has been screened
9 off from this case. He submitted an affidavit saying
10 he doesn't know anything relevant to this case. He has
11 not talked to us about anything relevant in this case,
12 and he is not going to.

13 The Solow case says that there is no
14 reasonable possibility that I as the litigator have
15 acquired confidential information concerning the former
16 client that is relevant to this case. That
17 disqualification of the entire firm is inappropriate.
18 We have no problem if your Honor enters an order -- we
19 think it is unnecessary, but if you want to enter an
20 order, fine, directing that Mr. Kislin and Mr. Friedman
21 be walled off and not spoken to and not have access to
22 files, etcetera, fine. But the notion that Eugenia
23 which has been represented -- excuse me, Casita which
24 has been represented by Gibson Dunn for some years now
25 should be denied access to counsel of choice because of

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1 the fact that Mr. Kislin changed firms is inconsistent
2 with Solow.

3 THE COURT: I asked the question of
4 Mr. Miller whether or not there was some prematurity to
5 this motion, and I understand that his response was
6 that it needs to be decided now and can be decided now.

7 Is there anything about this which is
8 premature, or is it completely at this point ripe for
9 decision?

10 MR. KARLAN: I think you are both right.

11 THE COURT: That's the most diplomatic answer
12 I have heard in the courtroom in a long time.

13 MR. KARLAN: I think this motion should be
14 denied now. I am hardpressed to make the argument -- I
15 would like to be able to make the argument, but I can't
16 think of a way to make it -- that Mr. Miller is somehow
17 precluded in a year or six months from making a motion
18 again if he has additional information or if the
19 situation has changed.

20 If certain issues became relevant to the case
21 which are not relevant now, I would not stand up -- I
22 might say he should have argued this before, but I
23 wouldn't say he is precluded from making the motion
24 again.

25 THE COURT: I have a question which is a

1 procedural question, and that is I also have an
2 application by MapleWood to intervene, MapleWood
3 Partners and MapleWood Management LP. I received no
4 opposition, so I assume you don't have opposition to
5 them intervening for these purposes?

6 MR. KARLAN: For these purposes, Judge.

7 THE COURT: So the application to intervene
8 is granted. I will deal with it on the merits, as I
9 will the entire motion.

10 It seems to me, before I have Mr. Miller
11 respond to you, that whatever happens here, that there
12 ought to be -- as I said back in October, that this has
13 to be resolved before the main action goes forward; do
14 you agree with that?

15 MR. KARLAN: It has to be decided before the
16 PI motion?

17 THE COURT: Yes.

18 MR. KARLAN: Judge, just to clarify
19 something, your Honor said that the initial order to
20 show cause had been held in abeyance. I think it is
21 more precise to say the TRO is granted.

22 THE COURT: Correct. That was sloppy on my
23 part.

24 MR. KARLAN: I won one, your Honor, and I
25 don't want the record not to reflect that.

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1 THE COURT: There was a TRO entered by the PI
2 hearing or determination was held in abeyance subject
3 to the motion to disqualify.

4 MR. KARLAN: Yes.

5 THE COURT: And that's a more precise way of
6 speaking. I will explain to my intern later that
7 precision is most important in the courtroom.

8 Mr. Miller?

9 MR. MILLER: Your Honor, Mr. Salomon was just
10 asking me to clarify something. If the preliminary
11 injunction matters are held in abeyance, other
12 proceedings such as answering the complaint are also
13 held in abeyance?

14 THE COURT: I don't have any problem with
15 that.

16 MR. MILLER: Thank you.

17 THE COURT: I am happy to say everything is
18 stayed until I decide this. That's what I thought I
19 did last time.

20 MR. MILLER: Thank you, Judge. I will be
21 very brief in response, your Honor.

22 With respect to the conflict waiver
23 agreement, Mr. Karlan argued that it was not in
24 connection with the Eugenia loan transaction. I
25 believe Mr. Karlan's position -- and I don't want to

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1 misstate it -- is that even if the conflict waiver
2 letter relates to the Eugenia loan, he believes that
3 this litigation, whether Casita needs to respond to the
4 capital call, is unrelated to the Eugenia loan. I
5 believe that's what Mr. Karlan was expressing.

6 THE COURT: That's my understanding.

7 MR. MILLER: Now, the reason why this
8 litigation is related to the loan transaction is
9 because the capital call related to the failure of AMC
10 Computer which arises from a default on the Eugenia
11 loan. The only reason that we are here before your
12 Honor is because Eugenia didn't get paid its money
13 under its loan.

14 THE COURT: That may be the reason you are
15 here, but it is not the identical transaction.

16 MR. MILLER: This lawsuit does not expressly
17 deal with a breach -- it is not asserting claims for a
18 breach of contract of the Eugenia credit agreement.

19 THE COURT: So if it doesn't assert a breach
20 of a claim -- of the subscription agreement --

21 MR. MILLER: It asserts a violation, and it
22 asserts that a capital call which was made in
23 connection with the Eugenia loan is invalid. That's
24 why it relates to the same transaction. The only
25 reason why they haven't paid the \$700,000 in the

1 capital call is because their affiliate lost --

2 THE COURT: How does the Eugenia transaction
3 enter into this at all? If I had a jury in the box
4 right now and they were to decide whether or not the
5 call was proper, what would be the relevance of
6 Eugenia, except the fact that it occurred?

7 MR. MILLER: Your Honor, one of the grounds
8 that Casita asserts in its complaint at Paragraph 18
9 and other places is that the capital call is invalid to
10 pay the litigation expenses related to the Eugenia
11 litigation which clearly relates to the Eugenia loan
12 transaction. That's what this is all about.

13 THE COURT: Isn't the only thing that comes
14 in is that the Eugenia transaction is triggering the
15 event?

16 MR. MILLER: They would contend --

17 THE COURT: Can they dispute at trial here
18 anything to do with the Eugenia insolvency or AMC's
19 insolvency?

20 MR. MILLER: If you read the complaint, what
21 they would be asserting at trial based on this
22 complaint is that Casita is not required to pay the
23 money to fund the litigation related to the Eugenia
24 loan because those indemnity expenses are unwarranted.
25 And I presume that they would assert as Eugenia has in

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1 other lawsuits that the MapleWood people committed
2 fraud and breached duties. So there would be issues in
3 the trial in this case as to whether or not the Eugenia
4 litigation has merit, because those would directly go
5 to whether the indemnity is required or not, which was
6 one of the purposes of the capital call. That's why
7 the current litigation before your Honor is related to
8 the Eugenia loan transaction that is the subject of the
9 conflict waiver.

10 Mr. Karlan also stated that there is no
11 evidence that the conflict waiver letter was signed by
12 any of the other parties. It was signed by Gibson Dunn
13 & Crutcher which is the party against whom we are
14 seeking to enforce this.

15 Now, this issue wasn't addressed in the
16 opposition, but I would submit to your Honor that based
17 on normal statute of frauds cases and analysis, if you
18 are asserting a claim against a party that signed it,
19 you can enforce it against that party because that
20 party signed it.

21 THE COURT: I don't think the argument is
22 that it is not enforceable against Gibson Dunn. I
23 thought the argument was that since it was only signed
24 by Ms. Becker that it is her understanding of what that
25 agreement contemplated that is relevant here. And

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1 since Mr. Glaser didn't sign it, his understanding of
2 it has no real relevance.

3 MR. MILLER: If that's what the argument was
4 I would go back to what I argued previously, that your
5 Honor has to look at the standard definition of
6 "affiliate" and your Honor needs to construe that
7 waiver against Gibson Dunn who drafted it, who did not
8 put anywhere in there to its own client that it clearly
9 had a duty to at this time that it viewed the
10 definition of "affiliate" to be narrowly construed.

11 THE COURT: I understand that argument. I
12 think I do.

13 MR. MILLER: I hope I have been clear, your
14 Honor.

15 With respect to the definition of
16 "affiliates," the cases that we cited also include
17 within definition of "affiliates" directors. So I
18 think even if Mr. Glaser is only one of the three
19 directors, he would still be considered an affiliate,
20 and, therefore, all of the MapleWood entities would
21 become affiliates based on the director status. So I
22 don't think that's a dispositive issue.

23 THE COURT: Anything else?

24 MR. MILLER: Lastly, I would submit to your
25 Honor that because Casita has made arguments about an

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1 ethical screen implementing Gibson Dunn -- and we don't
2 know anything about that, but I think the cases say you
3 should presume, whether it is a big firm, a
4 multi-office firm, what have you, presume that a
5 conflict is imputed to the entire firm. If your Honor
6 wants to go beyond that to not impute to the entire
7 firm, I think at a minimum we would need to know a lot
8 more about what Mr. Kislin swears in his affidavit.
9 When this screen was imposed? Was it imposed on the
10 front end? Did they segregate documents, etcetera? So
11 I think a lesser remedy would be premature at this
12 point.

13 THE COURT: Thank you.

14 Mr. Karlan, I have a question for you on the
15 issue that was raised by Mr. Miller concerning
16 indemnification. I didn't remember that in the
17 complaint, and I am interested in hearing your response
18 to that argument.

19 MR. KARLAN: I apologize, your Honor, I am
20 having trouble hearing you.

21 THE COURT: I'm sorry. I mumble.

22 The argument made by Mr. Miller is that
23 because of the indemnification for the Eugenia
24 litigation which is denied, that you are responsible
25 for that in Paragraph 18, I think he said, of the

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1 complaint, that that, according to his argument, makes
2 this related to and meets the test of the cases.

3 MR. KARLAN: Judge, Paragraph 18 is longer
4 than it should be, and I hate to have my own drafting
5 read back to me in court. But with all respect to
6 Mr. Miller -- and I know we are all hungry -- but
7 Paragraph 18 doesn't say what he told you it said. I
8 ask that your Honor take the time at another time to
9 read it.

10 Remember, your Honor, how this case got
11 started. They send us a two-line letter saying, Please
12 send us \$700,000 or we cancel your equity interest in
13 this fund. We write a letter back, a nice letter,
14 saying, We have about 150 questions about this. Why
15 are you calling a capital call for lawsuits where you
16 are not a party? Why are you calling capital calls
17 where there is insurance that covers Mr. Reale's
18 defenses? I think the insurance company is also paying
19 these firms. Maybe they will represent that to you. I
20 don't know. And they never responded. They said, We
21 are not answering the questions, and you have two hours
22 to get out of Dodge or you lose your equity. The next
23 thing we did was come in here running to you.

24 We have told you at the time the TRO was
25 entered if your Honor finds that the capital call was

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1 appropriate and that we are required to pay it, we will
2 pay it, because we cannot lose our equity investment.
3 We just didn't want to be put on the horns of a
4 dilemma. It may be that all of these issues dropped
5 out once, if ever, the defendant's firm answers some of
6 these questions.

7 THE COURT: Mr. Miller said, if I understand
8 it, that paragraph 18 -- I will use a phrase he didn't
9 use, and I don't mean it in a negative sense, but it
10 pulls in a review of the merits of the AMC litigation
11 because of the last sentence what justified expenses
12 can be incurred.

13 If I understood his argument, this paragraph
14 which rejects an obligation to pay for litigation
15 expenses in the AMC litigation and it would always then
16 be a question of whether they are bona fide expenses,
17 and that brings in the underlying AMC Eugenia
18 litigation. That's what I think he is saying.

19 MR. KARLAN: The last sentence of
20 Paragraph 18 refers to the following, Judge: The case
21 in front of Justice Freedman is a lawsuit by Eugenia to
22 enforce an absolute unconditional guarantee against two
23 other defendants, not AMC Computer, not MapleWood
24 Funds, not MapleWood Partners, but two other companies
25 who gave an unconditional guarantee. These two

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1 gentlemen were counsel in that case for those two
2 defendants as well. We questioned when the capital
3 call came in --

4 THE COURT: Your representation is that
5 Paragraph 18 does not intend to refer to the AMC
6 Eugenia litigation over the original loan agreement?

7 MR. KARLAN: That is correct. There is
8 litigation between AMC and Mr. Reale for fraud. That's
9 referred to in here.

10 THE COURT: What I think I will permit you to
11 do within the next seven days so that I will have it
12 clear is to file an amendment to this complaint. That
13 will be of some value to me when I read the complaint.

14 Since what I think you can do is just file
15 a -- I will permit you to file an amended, a first
16 amended verified complaint which would be in terms of
17 what I am authorizing today, simply an amendment of
18 Paragraph 18 to reflect what it is you said to me. It
19 ought to be made as expressly as possible. It may or
20 may not affect the argument that Mr. Miller has made.

21 And, Mr. Miller, so there is no issue left
22 unresponded to, when you receive that amended complaint
23 within seven days, you will have seven days, if you
24 think it is appropriate, to write me a letter with
25 regard to whether that changes your position or doesn't

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1 change your position.

2 And, Mr. Karlan, I don't think I will need a
3 further letter from you because I will have it in front
4 of me.

5 Does that make sense?

6 MR. KARLAN: Yes, Judge. We will do that.

7 MR. MILLER: We will do that.

8 THE COURT: That completes the proceedings
9 here today. I will mark this submitted. The clerk is
10 going to tell me that I need to put a date on the
11 calendar or else the computer is not going to take it,
12 so let me put a date down arbitrarily. I will pick a
13 date in January. I hope to get it done before that,
14 but I will pick January 31 as an arbitrary control
15 date.

16 MR. MILLER: Excuse me, your Honor, one
17 housekeeping matter.

18 We have the hearing in front of Judge
19 Freedman this afternoon, and unfortunately I only have
20 that one copy of those bills, so I --

21 THE COURT: These?

22 MR. MILLER: The invoices, the law firm
23 invoices.

24 THE COURT: (Handing) Okay. I am returning
25 them to you. I wrote on it "in camera," but get a copy

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1 for the court.

2 MR. MILLER: We will hand deliver a copy.

3 THE COURT: Okay.

4 MR. MILLER: What time on January 31?

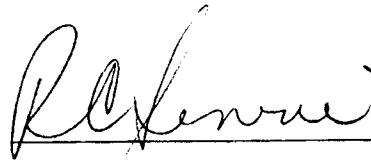
5 THE COURT: 9:30, but it is not realistic.
6 It is just a control date for the computer. I will do
7 my best to get a decision before then.

8 Counsel, I would like a transcript of this
9 proceeding.

10 Have a good holiday. Thank you.

11 * * *

12 The foregoing is hereby certified to be a true and
13 accurate transcript of the proceedings.

14
15 
16 _____

17 Rachel C. Simone

18 Senior Court Reporter
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